Supreme Court, U. S.
FILED
DEC 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

REPLY BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
10 Columbus Circle
Suite 2030
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMAN & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

TABLE OF CONTENTS

PAGE

I Federal Law Governs the Determination of Whether the Statute of Limitations Should be Tolled 1

II The Determination of Congress to End Discrimination in Employment, Its Preference for Conciliation and Its Intention to Preserve the Right of Action Under Section 1981 Can Best be Reconciled by Adopting the Tolling Rule Urged by Petitioner 4

III The Issue of Whether Petitioner's Section 1981 Claims Against Respondent Locals Are Barred by the Doctrine of *Res Judicata* Should be Remanded to the Court of Appeals 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Alexander v. Gardner Co., 39 L.Ed. 147 (1974) 5

American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) 3

Atkins v. Schmutz Manufacturing Company, 435 F.2d 527 (4th Cir. 1970) (*en banc*), *cert. denied*, 402 U.S. 932 (1971) 2

Boudreaux v. Baton Rouge Marine Construction Co., 437 F.2d 1011 (5th Cir. 1971) 4

PAGE

Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965) 3
Byrd v. Blue Ridge Cooperative, 356 U.S. 525 (1958) .. 2

Cates v. Trans World Airlines, Inc., 8 CCH EPD ¶9755 (S.D.N.Y., October 1, 1974) 5
Chamberlain v. Brown, 442 S.W. 2d 248 (1969) 3

Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) 2

Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974) 3, 4

Hanna v. Plumer, 380 U.S. 460 (1965) 2
Holmberg v. Armbrecht, 327 U.S. 392 (1946) 2

Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965) 2

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C Cir. 1973) 4
Moviecolor Limited v. Eastman Kodak Company, 288 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1961) 2

Other Authorities

Legislative History of the Equal Employment Opportunity Act of 1972, Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, November 1972 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

REPLY BRIEF FOR PETITIONER

Petitioner submits this brief in reply to the briefs for respondent REA Express, Inc., and respondents Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local.

I

Federal Law Governs the Determination of Whether the Statute of Limitations Should be Tolled.

Respondent REA Express, Inc., erroneously contends that whether the period of limitations on petitioner's Section 1981 action was tolled by his filing of an EEOC charge

is controlled by Tennessee's statutory and decisional law (REA Br. 5-7).[1] The principle is well established that when federal courts sit to enforce federally-created rights, they look to federal law to determine the circumstances under which a state statute of limitations should bar the action. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *Esplin* v. *Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Janigan* v. *Taylor*, 344 F.2d 781 (1st Cir. 1965); *Moviecolor Limited* v. *Eastman Kodak Company*, 288 F.2d 80 (2d Cir. 1961), *cert. denied* 368 U.S. 821 (1961). Even in diversity litigation, questions which are a matter of federal concern are answered by reference to federal law. *Hanna* v. *Plumer*, 380 U.S. 460 (1965); *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525 (1958); *Atkins* v. *Schmutz Manufacturing Company*, 435 F.2d 527 (4th Cir. 1970) (*en banc*), *cert. denied*, 402 U.S. 932 (1971). In *Atkins* v. *Schmutz Manufacturing Company*, *supra*, the court held that the tolling effect of the pendency of an identical suit in another federal court is to be determined as a matter of federal, rather than state law, pointing out that the state tolling rule, born of state court institutional considerations, has no relevance in the context of the federal system, 435 F.2d at 538 n.48.

Judge Friendly's rationale, in *Moviecolor Limited* v. *Eastman Kodak Company*, *supra*, for applying federal law in determining the tolling effect of concealment is equally applicable to the case at bar:

[1] The cases cited by REA in support of this proposition (REA Br. 5-6) involve the suspension of state statutes of limitations during periods of incarceration or other disability and the applicability of state savings statutes, matters with respect to which there are no federal "affirmative countervailing considerations". *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525 (1958). See *Moviecolor Limited* v. *Eastman Kodak Company*, 288 F.2d 80, 83-84 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1961).

> Plainly Congress did not deem complete nation-wide uniformity of limitations essential in such cases, else it would have provided its own period, . . . But we still must endeavor to determine whether, on the narrower issue of the effect of the wrongdoer's concealment, [or, in the instant case, the effect of the filing of an EEOC charge] Congress would have preferred uniformity among the federal courts with respect to the right it had created, a uniformity favorable to recoveries by plaintiffs, or uniformity as between the treatment of this right in federal courts and of rights of a related conceptual character in the courts of the state where the federal court sits.
>
> We think the former, at least where, as here, the right not merely is federally created but is enforceable only in the federal courts.

288 F.2d at 84.

In *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424 (1965), this court suggested that in deciding whether a Congressionally imposed time-limit should in a given circumstance be tolled the proper question is whether Congressional purpose will thus be effectuated. See also, *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538 (1974). *A fortiori*, this approach would be proper in dealing with a state statute of limitations, particularly where, as here, the state statute evidences hostility to the enforcement of the federally created rights.[2] *Guerra* v. *Manchester Terminal*

[2] The Supreme Court of Tennessee has held that Tennessee courts should not entertain actions brought under federal civil rights acts. *Chamberlain* v. *Brown*, 442 S.W.2d 248 (1969). Hence, as in *Moviecolor*, no purpose would be served by applying state tolling rules to actions seeking to enforce rights guaranteed by these acts.

Corp., 498 F.2d 641, 649-50 (5th Cir. 1974); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95 n.30 (D.C. Cir. 1973).

II

The Determination of Congress to End Discrimination in Employment, Its Preference for Conciliation and Its Intention to Preserve the Right of Action Under Section 1981 Can Best be Reconciled by Adopting the Tolling Rule Urged by Petitioner.

The contention of respondents that the tolling of the state statute of limitations is "unnecessary" because petitioner could have brought suit under Title VII as well as Section 1981 within the one-year period provided by Tennessee Code Ann. §28-304 by requesting a right-to-sue letter from the EEOC[3] is completely unresponsive to petitioner's principal point, namely, that he should have been allowed to invoke the resources of the EEOC, including its investigatory and conciliatory processes, before resorting to litigation (Pet. Br. 10-11).

In *Guerra* v. *Manchester Terminal Corp., supra,* (5th Cir. 1974), the Fifth Circuit Court of Appeals recently reaffirmed its previous decision[4] that the filing of a charge with the EEOC tolls the running of the statute of limitations applicable to actions brought under 42 U.S.C. §1981, stating:

> The determination that attempts to invoke the assistance of the EEOC should toll the §1981 limitations period rested on our recognition that Congress intended Title VII to be an important, but not the only, weapon in the arsenal against employment discrimination. We could find no expression of legislative intention to preempt or repeal §1981, and in fashioning a means of reconciling the two statutes we eschewed jurisdictional election or exhaustion of remedies doctrines. On the other hand, by using a tolling rule we could implement Title VII's policy of encouraging adjustment and settlement of grievances short of courtroom litigation through use of an administrative body with a developing expertise in problems of employment discrimination, while at the same time preserving intact the recently revivified remedy of §1981.

498 F.2d at 650. Accord: *Cates* v. *Trans World Airlines, Inc.*, 8 CCH EPD ¶ 9755 (S.D.N.Y. October 1, 1974).

Petitioner submits that the best, and perhaps the only, way to effectuate, on the one hand, Congress' clearly expressed preference for administrative proceedings,[5] and, on the other, its no less clearly expressed intention to preserve for the individual his right of action under Section 1981[6] is

[3] REA Br. at 9 n.2; BRAC Br. at 13.

[4] *Boudreaux* v. *Baton Rouge Marine Construction Co.*, 437 F.2d 1011, 1017 n.16 (5th Cir. 1971).

[5] The section-by-section analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972 as finally enacted, prepared by Senators Williams and Javits, states:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the office of the EEOC or the Attorney General, as appropriate. However, as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.

Legislative History of the Equal Employment Opportunity Act of 1972, Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, November 1972, at 1847. See also, *Alexander* v. *Gardner-Denver Co.*, 39 L.Ed.2d 147, 156 (1974).

[6] In the Senate debate on Senator Hruska's proposed amendment making Title VII the exclusive remedy for employment discrimination, Senator Javits pointed out:

by tolling the running of the statute of limitations on the latter during the pendency of the former.

III

The Issue of Whether Petitioner's Section 1981 Claims Against Respondent Locals Are Barred by the Doctrine of *Res Judicata* Should be Remanded to the Court of Appeals.

By order entered June 14, 1971, the District Court in petitioner's first suit (No. C-71-72) granted summary judgment to the respondent BRAC locals "on the grounds that from the undisputed facts plaintiffs have no grounds for relief against said Unions under the Civil Rights Act of 1964" (92a). The District Court in petitioner's second suit (No. C-72-183) held that petitioner's claim against respondent locals was barred by the doctrine of *res judicata* (101a). The Court of Appeals, in its original decision, did not reach this issue, but, in its opinion denying rehearing stated in a footnote its agreement with the District Court (115a).

> One other aspect of the matter which is cut off [by the exclusive remedy amendment] is the possibility of using civil rights acts long antedating the Civil Rights Act of 1964 in a given situation which might fall, because of the statute of limitations or other provisions, in the interstices of the Civil Rights Act of 1964. This is rather infrequent, but it is a valuable protection.
>
> . . . The idea is to enforce the law and not let people drop between two stools where they are actually violating the law.

Legislative History, supra, at 1400.

Senator Williams, in the same debate, added:

> [T]he courts have specifically held that Title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.

Id. at 1403.

In his Petition for a Writ of Certiorari, petitioner presented the question of whether, as to his causes of action under either Title VII or Section 1981, an interlocutory order granting unopposed motions for summary judgment in an action subsequently dismissed without prejudice for failure to obtain counsel has *res judicata* effect (Pet. at 3). Respondent locals contend that this Court's denial of certiorari on this question constitutes a final judgment in favor of the respondent locals (BRAC Br. at 12; BRAC Reply Br. at 2-3). To the contrary, it is apparent from the record that petitioner's Section 1981 claims against the locals have never been decided on the merits.

Respondent BRAC locals' motion for dismissal or summary judgment in the first suit was based entirely on procedural grounds (72a-73a). In view of the fact that the record on which the District Court granted the motion contained undisputed evidence that the BRAC locals were segregated and that dues in the black local were higher than dues in the white local,[7] both of which are clearly violative of Section 703(c) of Title VII (42 U.S.C. §2000e-2(c)) the granting of summary judgment to the BRAC locals must have been on procedural grounds not applicable to Section 1981.

The Court of Appeals' noting, in its opinion denying rehearing, that it agreed with the District Court on the *res judicata* issue does not constitute such a carefully considered judgment on a highly technical and critical issue that it should have the effect of a final disposition. It is respectfully submitted that should petitioner prevail on

---

[7] Interrogatories No. 1 of Defendants Tri-State Local, etc. to Plaintiff Willie Johnson, Nos. 3 and 25 (78a, 81a-82a) and answers thereto (86a, 88a).

the tolling issue, the *res judicata* issue should be remanded to the Court of Appeals for reconsideration and clarification.

CONCLUSION

For the reasons set forth in petitioner's main brief and hereinabove, Congressional policy as reflected in Section 1981 and Title VII, and federal concerns with respect to the efficient functioning of the federal courts, would best be served by holding that the filing of petitioner's EEOC charge tolled the running of the state statute of limitations applicable to his cause of action under 42 U.S.C. §1981 and that the statute of limitations did not begin to run again until he received his notice of right to bring suit from the EEOC.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
10 Columbus Circle
Suite 2030
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMAN & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel